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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS, and E. E. FUQUA,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233 (1950) 26, 32, 34
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, Judge John R. Brown dissenting, is reported at 295 F.2d 209 (R. 39-64). The District Court did not render an opinion (R. 37-38).

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1961 (R. 65). The petition for a writ

of certiorari was granted on February 20, 1962 (R. 66). 369 U.S. 802. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a suit to enforce an award of an airline system board of adjustment, created by requirement of the Railway Labor Act, presents a federal question that confers jurisdiction on a United States District Court.

STATUTES INVOLVED

The immediately pertinent statutory provision is section 204 of the Railway Labor Act (49 Stat. 1189, 45 U.S.C. § 184), and it provides in part that:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Other provisions of the Railway Labor Act are set out in the Appendix (*infra*, pp. 59-66), as are section 301(a) of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185(a)) (*infra*, p. 66), and the general jurisdictional statutes, 28 U.S.C. § 1331(a), 62 Stat. 930, amended 72 Stat. 415, and 28 U.S.C. § 1337, 62 Stat. 931 (*infra*, p. 66).

STATEMENT

On March 14, 1957, pursuant to an election conducted by the National Mediation Board under the Railway Labor Act, petitioner International Association of Machinists (herein called the Union) was certified as the collective bargaining representative of the airline mechanics and stock and stores employees of respondent Central Airlines, Inc. (herein called the carrier) (R. 2, 28). On May 7, 1957, in accordance with the requirement of the Railway Labor Act, the Union and the carrier established a board of adjustment known as the Central-IAM System Board of Adjustment (R. 2, 28-29). The agreement to establish and maintain the board recites that it was entered into "In compliance with Section 204, Title II of the Railway Labor Act, as amended . . ." (R. 5).

The agreement defined the jurisdiction of the board (R. 5):

> The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of the interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

The board is composed of four members, two selected by the Union and two by the carrier (R. 5). Disputes not settled by the parties are referred to the board for determination (R. 5-6). If the board deadlocks, either the Union or the carrier may petition the National Mediation Board for appointment of a neutral to sit with the board as a member of it (R. 8). "Such Board of Adjustment, as then constituted, shall hear the parties with reference to the dispute pending before it, and a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 8).

Section 22 of the collective bargaining agreement provides that "An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon" upon timely written request, and "shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives" (R. 16). On April 3 and 4, 1958, six employees of the carrier declined to work overtime as requested (R. 11-12). As a result, on April 4 and 5, 1958, the carrier suspended the six employees pending its investigation of the matter, and instructed them to appear "for interview by the Company so that your statement can be considered by the Company in determining what if any action is to be taken in this connection" (R. 12-13). The carrier refused to permit a union representative to be present at the interview and the employees refused to submit to an interview in the absence of union representation (R. 13-14). On April 7, 1958, the carrier discharged the six employees (R. 1-2, 28), informing them that their decision "to refuse to talk to us . . . leaves us no

alternative except to terminate your services . . ." (R. 14).

The six employees filed grievances protesting their discharge (R. 14-15). No settlement having been reached, the dispute was submitted to the adjustment board (R. 3, 29). The board deadlocked (R. 3, 29). A neutral fifth member was appointed by the National Mediation Board (R. 3, 29). On November 3, 1959, after hearing, the neutral submitted an opinion and award, in which he was joined by the two members selected by the Union, sustaining the grievances (R. 3, 29, 10-26). The majority observed in part that (R. 25):

> It would be entirely destructive of the rights afforded the employees under Section 22 to say that the Company may discipline an employee, call the employee in for an interview on the subject matter forming the basis for the discipline and then say to him "You are not entitled to representation because this is not a hearing under Section 22 since you did not make a request for it." Regardless of the fact that the Company called the scheduled session of April 7, 1958 in Mr. Vaughan's office an "interview" it is quite clear that it was to be a hearing on the grievants' failure to perform work assignments as directed. As a matter of fact, Mr. Vaughan looked upon it as a hearing, as is evidenced by that part of his testimony quoted above. In effect what happened here was that the Company "jumped the gun" on the procedure set forth in Section 22(a). In doing so, it cannot be heard to say that the employees involved had no right to Union representation at the hearing. Manifestly, to hold otherwise in the circumstances of this case would render completely worthless the rights of the employee as set forth in Section 22(a)4.

> We can only conclude that the Company's refusal to allow the grievants the right of representation at the hearing scheduled for April 7, 1958 was in violation of Section 22 of the Collective Bargaining Agreement.

An award was entered directing the reinstatement of the six employees with full seniority and with compensation for any loss of pay (R. 26).

Alleging that the carrier refused to comply with the award (R. 3), the Union and the six employees brought an action against the carrier in the United States District Court for the Northern District of Texas to enforce the award (R. 1-4), predicating jurisdiction on 28 U.S.C. § 1331 in that the matter in controversy exceeds "the sum or value of $10,000, exclusive of interests and costs, and arises under the laws of the United States, specifically under the Railway Labor Act . . ." (R. 4). The District Court dismissed the action for want of jurisdiction, "for the reasons that there is no diversity of citizenship involved, and that further there is no federal question involving the Constitution, laws or treaties of the United States . . ." (R. 38). The Court of Appeals affirmed in a divided opinion (R. 39-64). The court stated that "federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). It nevertheless concluded that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). On that basis it decided that federal question jurisdiction

did not exist under either 28 U.S.C. § 1331 or 28 U.S.C. § 1337 (R. 46-59).[1] In dissent, Judge Brown observed that "I am unable to comprehend how a contract compelled by federal law and to be interpreted by courts under federal law principles may realistically be characterized as a creation of the state, so that a suit to enforce it is not one 'arising under' federal law" (R. 61).

SUMMARY ARGUMENT

I.

The procedure for the adjustment of disputes prescribed by the agreement between the Union and the carrier, and the specific award rendered in conformity with that procedure requiring the reinstatement of six employees with back pay, are the product of positive duty imposed by federal statute. The Railway Labor Act makes it "the duty" of all carriers and the representatives of their employees "to exert every reasonable effort" to "maintain agreements" (title I, sec. 2, first, title II, sec. 201). To fulfill this duty further positive obligations are placed by the statute upon air carriers and the representatives of their employees in the adjustment of disputes growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, and working conditions. These disputes "shall be handled in the usual manner" through the chief operating officer of the carrier, and "failing to reach an agreement in this manner, the dispute may be referred by petition of the parties or by either party to an appropriate adjustment board . . ." (RLA, title II, sec. 204). It is "the duty" of

[1] Accord, *ALPA* v. *Trans World Airlines*, 203 F. Supp. 438 (W.D. Mo.)

the carrier and the representative "to establish" an adjustment board to which an unresolved dispute may be referred (*ibid.*). The adjustment board to be created is one "for the purpose of adjusting and deciding disputes" between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (RLA, title II, sec. 204, title I, secs. 3, second, 3(i)). This adjustment procedure fulfills that part of the "purposes of the Act" designed "to provide for the prompt and orderly settlement of all disputes" of this class (RLA, title I, sec. 2(5)).

The Railway Labor Act thus mandates contractual creation of a settlement system centered upon the adjustment board as the sole forum through which to resolve disputes over grievances and the interpretation and application of the agreement. The federal command to establish and follow the procedure infuses every aspect of its functioning. From the establishment of an adjustment board through rendition of an award, any question concerning the process at every step is indivisibly governed by federal law. First, the statute alone furnishes the determinants by which to decide whether the duty to establish an adjustment board has been fulfilled and whether the jurisdiction vested by the contract in the adjustment board exceeds or is short of the statutorily required bounds. Second, the duty to establish an adjustment board provides the premise for the requirement that there can be no recourse to any tribunal other than the board to decide disputes within the board's competence. Third, the jurisdiction of the adjustment board is limited to "minor disputes" as distinguished from "major dis-

putes." A controversy concerning whether a particular dispute is within the competence of the board because it is "minor" or outside its competence because it is "major" is referable for solution exclusively to the statutory demarcation between major and minor disputes. Furthermore, although the dispute grows out of a grievance or the interpretation or application of an agreement and is therefore within the province of the board, there may be resistance to submission of the dispute to the board upon such a ground as the claim that it is so frivolous that there is no genuine dispute for the board to decide. The standard by which to decide such a controversy must be federally fashioned and its essence must be drawn from an evaluation and fulfillment of the purpose of Congress in requiring the establishment of an adjustment board. Fourth, federal law also controls at the final step of the procedure in determining the effect to be accorded to an award rendered by the adjustment board. The work of the board and therefore the object of Congress can be wrecked if the award does not enjoy a high degree of finality but is simply a facile prelude to further litigation. Accordingly, in a proceeding to enforce or set aside the award or on a collateral attack upon it, the standard for determining the efficacy of the award must be devised and applied in the light of the congressional purpose to provide for prompt and orderly settlement through the means of the adjustment board procedure. State law cannot substitute for a federal standard, for there is no assurance that state law has the quality essential to satisfying the federal purpose, and in any event the application of state law means the application of the variegated standards of fifty different sovereigns. The formulation and application of a standard for enforcement of an award

must therefore be a question of federal law because it is an integral adjunct of the effective functioning of the system that Congress has required be created.

The court below agrees. It observed that state arbitration "statutes varied greatly in their coverage and their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards . . ." (R. 50). It reaffirmed the conclusion it reached in an earlier case that "federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). And in that earlier case the court below stated that, "Congress having required the negotiation of collective bargaining agreements, and the establishment of boards of adjustment to interpret them, we deem it a reasonable corollary thereto that it intended that the scope of review in appeals from these boards should be determined by federal courts, applying federal law." *Sigfred* v. *Pan American World Airways*, 230 F.2d 13, 17 (C.A. 5). cert. denied, 351 U.S. 925.

II

This is an action to enforce an award issued by the adjustment board. Federal law controls its disposition. The standard applicable to test the validity of the award is federally fashioned and enforcement or vacation of the award depends upon the effect of the federal standard. There is no law but the federal law which is pertinent to the action. There is no other

law under which the action can arise. The existence of federal question jurisdiction therefore follows as a matter of course from the conclusion that federal law governs the enforcement of the award. For "it appears from the face of the complaint that determination of the suit depends upon a question of federal law." *Pan American Pet. Corp.* v. *Superior Court*, 366 U.S. 656, 663.

The true posture of decision by the court below is that, notwithstanding the dependence of the action on federal law, it is inferable from the air part of the Railway Labor Act that Congress nevertheless committed enforcement of the award to state courts and withheld jurisdiction from the federal courts absent diversity. The basis for the court's inference is that the specific provision in the Railway Labor Act for recourse to a federal district court to enforce an award issued by the National Air Transport Adjustment Board, in comparison with the absence of a like provision in the case of an award issued by the contractually established adjustment board, negatively implies that Congress barred access to a federal court absent diversity to enforce an award issued by the latter board. There is no tenable basis for this conclusion. Congress has established coequal methods of adjustment in providing for the creation of both a contractual board and the National Air Transport Adjustment Board. Each method possesses commensurate capacity for effective achievement of the congressional objective "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." An award by either type of board has equal dignity. Since there is no

basis for invidious comparison between them, access to a federal district court to enforce an award issued by the National Air Transport Adjustment Board suggests equivalent access to enforce an award of the contractual board. Specific provision for recourse to a federal district court to enforce an award of the Air Transport Board, if it plausibly argues in favor of any differentiation, implies that the federal court is the *exclusive* forum for enforcement of an award rendered by that board. But it does not imply debarment from the federal court absent diversity to enforce an award rendered by the contractual board. The general statutory grants of federal question jurisdiction confer an incontrovertible basis for invoking the competence of the federal courts for this purpose. Silence or tenuous negative implication do not destroy this fountainhead of jurisdiction. Surely Congress did not in the 1936 enactment of the air part of the Railway Labor Act *pro tanto* repeal the statutory grant of federal question jurisdiction which has existed since 1875.

The court below agrees that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . ." (R. 45, n. 7). It nevertheless states, in a patent self-contradiction, that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59), and on the basis of this self-contradiction it denies the existence of federal question jurisdiction. This simply will not do. An action is created by the sovereign who prescribes the rules for its governance. Congress through the enactment of the air part of the Railway Labor Act prescribes the rules for the governance of an action to enforce an award of an adjustment board. State law does not enter into it. State law does not

require creation of the adjustment board; state law cannot forbid establishment of the adjustment board; state law cannot release the parties from obligatory recourse to the adjustment board; the adjustment board operates free of state law; and state law does not control the enforceability of the award. An action cannot be state-created if the governing rule in support of plaintiff's claim is federally prescribed.

ARGUMENT

28 U.S.C. § 1331(a) provides that "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1337 provides in part that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ." The complaint alleges that the matter in controversy exceeds $10,000 and arises under the Railway Labor Act (R. 4). The crucial inquiry is therefore the same under either jurisdictional statute, namely, whether the action does arise under the Railway Labor Act. If it does, jurisdiction is properly founded on 28 U.S.C. § 1331, since the requisite amount is alleged, and on 28 U.S.C. § 1337, since the Railway Labor Act is a federal statute regulating commerce.

The Railway Labor Act divides into two parts. Title I pertains to rail transportation, title II to air transportation. The Railway Labor Act, originally confined to rail carriage, was amended on April 10, 1936 by the addition of the air part to it. 80 Cong. Rec. 5411. We shall show, first, that federal law created by

the air part of the Railway Labor Act controls the enforcement of an award issued by an adjustment board, and second, that the existence of federal question jurisdiction follows as a matter of course from the determination that federal law governs the enforcement of the award.

I. FEDERAL LAW CREATED BY THE AIR PART OF THE RAILWAY LABOR ACT REQUIRES THE ESTABLISHMENT OF AN ADJUSTMENT BOARD, AND GOVERNS EVERY ASPECT OF ITS FUNCTIONING, INCLUDING A PROCEEDING TO ENFORCE AN AWARD ISSUED BY IT.

A. An Outline of the Statutory Scheme; The Duty to Maintain Agreements Prescribed by It.

The procedure for the adjustment of disputes prescribed by the agreement between the Union and the carrier, and the specific award rendered in conformity with that procedure requiring the reinstatement of six employees with back pay, are the product of positive duty imposed by federal statute. Section 2, first, title I, of the Railway Labor Act, applicable to rail carriers and their employees and extended to air carriers and their employees by section 201, title II, makes it "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and *maintain agreements* concerning rates of pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements* or otherwise . . ." (emphasis supplied). To fulfill the duty to exert every reasonable effort to maintain agreements, section 204, title II, of the Railway Labor Act, applicable exclusively to air carriers and their employees, provides in part that:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay,

> rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an agreement in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

The next paragraph of section 204 makes it the "duty" of the carrier and the employees' representative "to establish" an adjustment board to which an unresolved dispute may be referred:

> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, title I, of this Act.

Under the authority of section 3, title I, applicable to rail carriers and their employees, the carrier and the employees' representative may agree "to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section" (Sec. 3, second, title I). The disputes specified are "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (Sec. 3(i), title I). The adjustment procedure fulfills that part of the "purposes of the Act" designed "to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (Sec. 2(5), title I).

The adjustment board, although set up by contract, is thus established pursuant to a statutory "duty to create it. . . . This gives it a public character that cannot be ignored." *Edwards* v. *Capital Airlines*, 176 F.2d 755, 760 (C.A.D.C.), cert. denied, 338 U.S. 885.[2] The statute mandates contractual creation of a settlement system centered upon the adjustment board as the sole forum through which to resolve disputes over grievances and the interpretation or application of the agreement. In this respect the policy expressed by the Railway Labor Act for air transportation is more forceful and affirmative than the policy expressed by the Labor Management Relations Act, 1947, for industry generally. Under the latter "Final adjustment by a method agreed upon by the parties is . . . declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" (LMRA, title II, sec. 203(d)). But there is no duty to establish such a method. All that is required is that the employer and the union upon the request of either bargain in good faith upon the subject (LMRA, title I, secs. 8(a)(5), 8(b)(3), 8(d)). And they are free to agree upon self-help and conventional litiga-

[2] See also, *American Airlines* v. *ALPA*, 91 F. Supp. 629, 632 (E.D.N.Y.):

> "The authority or jurisdiction of the System Board is statutory . . . . It cannot be extended by agreement of the parties, for it is not a private board of arbitration."

tion, no less than upon a grievance procedure culminating in arbitration, as the means for resolving differences. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 211-212; *Teamsters Local Union No. 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711. Not so in air transportation under the Railway Labor Act. In this industry Congress has made the basic decision requiring recourse to the adjustment board, which the carrier and the union must create, as the means of settling grievances or disputes over the interpretation and application of the agreement. Congress imposed the duty to exert every reasonable effort to "maintain agreements"; it channelled fulfillment of this duty through a board established for the purpose of "adjusting and deciding" disputes over grievances and the interpretation and application of agreements; and by this means it sought to achieve its objective of "prompt and orderly settlement of all disputes" of this class.

The affirmative mandatory duty to maintain agreements imposed by the Railway Labor Act has been emphasized by this Court as the fundamental characteristic which distinguishes that statute from the Labor Management Relations Act, 1947. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. Concerning the Railway Labor Act, this Court observed that (*id.* at 211):

> [In *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U.S. 30] we were dealing with a strike called by the union in defiance of an affirmative duty, imposed upon the union by the Railway Labor Act itself, compelling unions to settle disputes as to interpretation of an existing collective bargaining agreement, not by collective union pressures on the railroad but by submitting them to the Railroad Adjustment Board as the exclusive means of final determination of such "minor" dis-

> putes. * * * Indeed, the Court was able to conclude in *Chicago River* "that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

Concerning the Labor Management Relations Act, 1947, the Court observed in contradistinction that (*id.* at 211-212)

> Here, on the other hand, [in an action brought under section 301 of the Labor Management Relations Act, 1947], we are dealing with a suit under a quite different law which does not itself compel a particular, exclusive method for settling disputes nor impose any requirement, either upon unions or employers, or upon the courts, that is in any way inconsistent with a continuation of the Norris-LaGuardia Act's proscription of federal labor injunctions against strikes and peaceful picketing. * * * And certainly no one could contend that § 301 was intended to set up any such system of "compulsory arbitration" as the exclusive method for settling grievances under the Taft-Hartley Act.

While *Sinclair* adverted specifically to the rail rather than the air part of the Railway Labor Act, there is no difference between the two insofar as both mandate the duty to maintain agreements by requiring adherence to a prescribed procedure to adjust disputes as to interpretation or application of the agreement. *IAM* v. *Northwest Airlines*, 50 LRRM 2499, 2503 (C.A. 8, June 19, 1962).

The federal command imposed by the air part of the Railway Labor Act to create and follow the adjustment

procedure infuses every aspect of its functioning. From the establishment of an adjustment board through rendition of an award, any question concerning the process at every step is necessarily referable for its solution to the federal command: whether the carrier and the representative have discharged their statutory obligation to establish an adjustment board and whether the board which has been created comports with the statutory requirement;[3] whether the adjustment board may be bypassed in favor of another forum or mode;[4] whether a dispute is within the jurisdiction of the adjustment board, so as to require or permit its determination by the board, and the standard by which to decide the question;[5] whether an award issued by an adjustment board is conclusive or reviewable, and, if reviewable, the standard of review which is to apply.[6] These questions interlock. They are subsidiary to the statutory requirement that an adjust-

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[3] *Cf., UAW* v. *Delta Air Lines*, 83 F. Supp. 63 (N.D.Ga.).

[4] *Cf., Pan American World Airways, Inc.* v. *Division of Labor Law Enforcement*, 50 LRRM 2135 (D.C.N.D. Cal., March 28, 1962) (three-judge court); *Crusen* v. *United Air Lines*, 239 F. 2d 863 (C.A. 10), affirming, 141 F. Supp. 347 (D. Col.).

[5] *Cf., Flight Engineers* v. *American Airlines*, 50 LRRM 2453 (C.A.5, June 7, 1962); *IAM* v. *Northwest Airlines*, 50 LRRM 2499 (C.A. 8, June 19, 1962); *Pan American World Airways, Inc.* v. *ALPA*, 206 N.Y. Supp. 2d 98, 106-111, 22 Misc. 2d 148; *Griggs* v. *Transocean Airlines*, 176 Cal. App. 2d 843, 1 Cal. Rep. 803, 805-807.

[6] *Cf., Edwards* v. *Capital Airlines*, 176 F.2d 755 (C.A. D.C.), cert. denied, 338 U.S. 885; *Wooley* v. *Eastern Air Lines*, 250 F. 2d 86, 90-91 (C.A. 5); *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13 (C.A. 5), cert. denied, 351 U.S. 925; *Bower* v. *Eastern Airlines*, 214 F.2d 623, 625-627 (C.A.3), cert. denied, 348 U.S. 871; *Farris* v. *Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash.); *American Airlines* v. *ALPA*, 91 F. Supp. 629 (E.D.N.Y.).

ment board be created. The major premise for their determination flows from the purpose of Congress in requiring establishment of the board and ascertainment of the means essential to give efficacy to that purpose. These are federal questions governed by federal law, for the answers to them turn upon implementation of the federal command.

We turn now to a particularized consideration of each step in the creation and operation of the adjustment board to show that the whole of the process is indivisibly governed by federal law.

B. The Duty to Establish the Adjustment Board.

The duty to establish an adjustment board with specified jurisdiction can give rise to the question whether the duty has been fulfilled and whether the contract establishing the board has vested it with jurisdiction which exceeds or is short of the statutorily required bounds. The question is inherently federal in character. It is the statute which creates the duty and gives rise to the controversy as to whether the duty has been met. There is nothing but the statute to which to look in deciding the controversy.

C. The Requirement of Exclusive Recourse to the Adjustment Board.

The duty to establish an adjustment board provides the premise for the requirement that there can be no recourse to any tribunal other than the board to decide disputes within the board's competence. It would be almost pointless to compel the parties to create a board but to leave them free to disregard it and resort to court. Under the rail part of the Railway Labor Act Congress has created the National Railroad Adjust-

ment Board with jurisdiction to decide the identical class of disputes which under the air part of the Act Congress has committed to the adjustment board contractually established pursuant to statutory duty. The jurisdiction of the NRAB is exclusive, precluding resort to any court, the purpose being to assure expertness and uniformity in the interpretation and application of the collective bargaining agreement and to prevent diffusion of disputes into a multiplicity of tribunals.[7] This conclusion was drawn from the purpose

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[7] *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548; *Slocum* v. *Del., L. & W. RR. Co.*, 339 U.S. 239; *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U.S. 255; *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561. A union may be enjoined from striking over matters pending before the NRAB (*Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. RR. Co.*, 353 U.S. 30; *cf.*, *Manion* v. *Kansas City Term. Trans. Co.*, 353 U.S. 927), and the injunction may be conditioned upon a carrier's maintenance of the status quo pending decision by the NRAB. *Brotherhood of Locomotive Engineers* v. *M.-K.-T. RR. Co.*, 363 U.S. 528. See also, as to the air part of the Railway Labor Act, *IAM* v. *Northwest Airlines*, 50 LRRM 2499 (C.A.8, June 19, 1962).

Under the rail part (*Moore* v. *Illinois Cent. R. Co.*, 312 U.S. 630), as under the air part (*Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653), a discharged employee may accept his severance pay from employment as final and sue in court to recover damages for wrongful discharge in breach of contract, his action being then controlled by state law. This is a narrow exception scrupulously confined to an action for wrongful discharge in which the employee accepts the termination of his employment. *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553-554; *Slocum* v. *Del., L. & W. RR. Co.*, 339 U.S. 239, 244-245; *Union Pacific RR. Co.* v. *Price*, 360 U. S. 601, 609, n. 8; Summers, *Individual Rights In Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 386-387 and n. 114. The exception is of course not applicable in this case.

Mention should be made of the question reserved by this Court in *Brotherhood of Locomotive Engineers* v. *M.-K.-T. RR. Co.*, 363 U.S. 528, 531, n. 3, "whether a federal court can, during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which gave rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief." Finally, there is the situation where a particular action may be both a violation of an agreement, and

of Congress in creating the NRAB. The identical conclusion is required by the identical purpose of Congress in commanding the creation of an adjustment board.[8] The purpose behind each is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (RLA, sec. 2(5), title I). Canalizing these disputes exclusively through the procedure ordained by Congress is essential to fulfillment of the purpose. And it is federal law alone which fashions the conclusion.

D. The Determination Whether a Dispute Is Within the Jurisdiction of the Adjustment Board.

The requirement of exclusive recourse to the adjustment board to resolve disputes falling within its jurisdiction does not dispense with the question whether a particular dispute is within or without the competence of the board. The adjustment board's jurisdiction is confined to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." Other disputes fall within the jurisdiction of the National Mediation Board, namely: "(a) A dispute con-

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therefore within the competence of an adjustment board under that rubric, and a violation of a duty imposed by the Railroad Labor Act, and hence within direct judicial cognizance under that heading.

[8] *Pan American World Airways, Inc.*, v. *Division of Labor Law Enforcement*, 50 LRRM 2135 (D.C.N.D. Cal., March 28, 1962) (three-judge court). Under section 3, second, title I, of the Railway Labor Act, authorizing rail carriers and representatives to agree to the establishment of a system, group, or regional board of adjustment as an alternative to proceeding before the National Railroad Adjustment Board, the adjustment board established by agreement has exclusive jurisdiction. *Atlantic Coast Line RR. Co.* v. *Pope*, 119 F. 2d 39, 43 (C.A. 4); *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 415 (E.D. Wis.).

cerning *changes* in rates of pay, rules, or working conditions not adjusted by the parties in conference. (b) Any other dispute *not referable to an adjustment board*, . . . and not adjusted in conference between the parties, or where conferences are refused." RLA, title II, sec. 203 (emphasis supplied). The air part of the Railway Labor Act thus carries over the distinction between "major disputes" and "minor disputes" which prevails under the rail part of the Act. *Cf., Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 722-728; *O'Donnell* v. *Pan American World Airways*, 200 F.2d 929 (C.A. 2). The authority of the adjustment board is limited to the so-called minor dispute. Were a carrier or a representative to refer a dispute to the adjustment board, the other party might resist submission of the dispute upon the ground that it is not a minor dispute within the competence of the board, and the question could be brought to a head in a judicial proceeding to compel the reluctant party to submit the dispute to the board for determination. The question then to be decided by the court is exclusively federal in character. It pertains entirely to the statutory demarcation between major and minor disputes. The statute furnishes the standard for decision.

Resistance to submission of a dispute to the adjustment board can also arise where, though the dispute grows out of a grievance or the interpretation or application of an agreement and is therefore within the province of the board, it is urged that the claim is so frivolous that there is no genuine dispute for the board to decide.[9] This was the situation before this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, dealing with a conventional contractual provision for the arbitration of grievances over interpretation

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[9] *Cf., Griggs* v. *Transocean Airlines*, 176 Cal. App. 2d 843, 1 Cal. Rep. 803, 806-807.

or application of the agreement in an industry covered by the Labor Management Relations Act, 1947. This Court held that "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious"; it is enough that "the party seeking arbitration is making a claim which on its face is governed by the contract"; "frivolous claims" no less than those thought to be "meritorious" are to be arbitrated. *Id.* at 567-568. The premise for the adoption of this standard was the policy expressed in section 203(d) of the Labor Management Relations Act, 1947: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Id. at* 566. See also, *Drake Bakeries* v. *Local 50, American Bakery Workers,* 370 U.S. 254, 263.

Whether the same standard should be adopted for the air part of the Railway Labor Act is exclusively a federal question. What the standard should be turns on evaluating and fulfilling the purpose of Congress in requiring the establishment of an adjustment board. Since compulsory creation and recourse to the adjustment board under the air part of the Railway Labor Act expresses an even more positive policy than inheres in the cognate principle underlying the Labor Management Relations Act, 1947 (*supra,* pp. 16-18), it follows *a fortiori* that submission of disputes to the adjustment board is obligatory regardless of the deemed frivolity of the claim. But if a different standard were adopted, it would only be because the difference is responsive to a distinctive attribute of the fed-

eral command to create an adjustment board. In either event it would be federal law, not state law, which fashions the standard. For example, state law permitting either party at will to revoke an executory agreement to arbitrate could not be interposed to permit a carrier or a representative to withhold a dispute from the adjustment board. The clash with the federal command would be too resounding not to be heard.[10] The sound of the clash would be softer but still unmistakable were the state standard to require a judicial prehearing of every dispute as a condition precedent to its submission to the adjustment board whenever the carrier or the representative chooses to contest its substantiality. And the vice would be compounded by a multiplicity of standards were each of the fifty states free to devise its own rule.[11] To safe-

[10] The court below states that in this case "jurisdiction lies with the state courts of Tarrant County, Texas" (R. 59). Texas follows the common law rule that an agreement to submit disputes to arbitration is revocable until an award is rendered. *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d 276 (C.A. 5) (applying Texas law). Nevertheless, the court below does not suggest that Texas law can free the carrier or the representative from obligatory recourse to the adjustment board as required by federal law. On the contrary, it declares that "State courts would be required to recognize the validity of arbitration agreements established under the federal law" (R. 48, n. 12).

[11] *Cf.*, 2 Beale, Conflict of Laws, §347.5, pp. 1245-1247 (1935):

> "American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, or the law intended by the parties to govern. * * * The American doctrine leads to confusion and uncertainty in the result of an arbitration provision. This is obviously contrary to the purpose of such agreements and the desires of business. It has resulted in a mad race for jurisdiction when an arbitration provision is sought to be enforced."

guard the integrity of the adjustment procedure Congress has ordained, there must be one rule; it must be federally fashioned; and it must draw its content from the need to give efficacy to the congressional scheme.

E. The Enforcement of An Award Rendered by the Adjustment Board.

Federal law also controls at the final step of the procedure that Congress has required be created. The effect to be accorded to an award rendered by the adjustment board, in a proceeding to enforce or set it aside or on a collateral attack upon it, can spell the difference between a useless or an efficaceous system. The "whole point of arbitration is lost if the winning party has to go to court to enforce the award and the judge requires the virtual relitigation of all the issues involved."[12] As this Court stated in fashioning the standard to prevail in an action under section 301(a) of the Labor Management Relations Act, 1947: "The refusal to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596.[13] At the same time this Court

[12] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 238 (1950). See also, *id.* at 263.

[13] Discussing the finality to be accorded an award rendered by the NRAB under the rail part of the Railway Labor Act, this Court stated: "Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory

indicated a limitation upon the finality of an award (*id.* at 597):

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Devising, refining and applying a standard which marks the line between plenary review and utter finality is a question of federal law under the air part of the Railway Labor Act no less than under section 301(a) of the Labor Management Relations Act, 1947. The agreement in this case provides that "a majority vote of the Board shall be final, binding, and conclusive . . ." (R. 8). The effect to be given to this compact must be drawn from the purpose of Congress in requiring creation of the board. The desideratum is provision "for the prompt and orderly settlement of all disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The work of the board and therefore the object of Congress can be wrecked if the award does not enjoy a high degree of finality but is simply a prelude to further litigation. There is then no promptness or order. The standard for testing the validity of an award must therefore draw its essence from the congressional purpose to

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scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . " *Union Pacific RR. Co.* v. *Price*, 360 U.S. 601, 616.

provide for prompt and orderly settlement through the means of the adjustment board procedure. This is the major premise which governs the whole.

State law or a distilled essence of it, although it may furnish clues to its formulation, cannot substitute for a federal standard. State law runs the gamut from virtual *de novo* review to virtual nonreview.[14] All would agree that an award requires vacation if it is infected with fraud, corruption, or gross procedural unfairness.[15] Few would disagree that an award "cannot be set aside for mere errors of judgment, either as to the law or as to the facts."[16] But the vexing question is ascertainment of the level at which "mere errors" are elevated to fundamental prejudicial defects. There is a vast range of choice in stating and applying a standard by which to test the validity of an award: whether it is "founded on such a basic mistake of fact that it clearly fails to express the judgment of the arbitrators";[17] whether it is in "manifest disregard" of the law;[18] whether it is so foreign to the tenor of the agree-

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[14] Note, *Judicial Review Of Arbitration Awards On the Merits*, 63 Harv. L. Rev. 681 (1950).

[15] *Cf.*, *Frazier* v. *Ford Motor Co.*, 364 Mich. 648, 112 N. W. 2d 80.

[16] *Wilkens* v. *Allen*, 169 N.Y. 494, 496, 62 N.E. 575, 576. See also, *Burchell* v. *Marsh*, 17 How. 344, 349; *Morceau* v. *Gould-National Batteries*, 50 LRRM 2046 (Mass., April 9, 1962).

[17] 6 Williston, Contracts, §1929A, pp. 5399-5400 (rev. ed. 1938); see also, Sturges, Commercial Arbitration and Awards, 787-793 (1930).

[18] *Wilko* v. *Swan*, 346 U. S. 427, 436-437; see also, *United States* v. *Farragut*, 89 U.S. 406, 420 ("manifest mistake of law"); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970, 974 (C.A. 3) (an award must be "in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute"); Sturges, Commercial Arbitration and Awards, 793-798 (1930).

ment it purports to interpret that it is in excess of the power conferred on the arbitrators;[19] whether it is against public policy.[20] The adoption of all, some, or none of these formulations depends upon their fitness to promote the purpose of Congress in requiring the establishment of the adjustment board procedure. "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement" (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578), it is necessary in drawing on precedent from commercial arbitration to keep a cautious eye trained on the difference. And a standard impeccable on its face requires perceptive

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[19] *Western Union Tel. Co.* v. *A.C.A.*, 299 N.Y. 177, 86 N.E. 2d 162, criticized in Note, 63 Harv. L. Rev. 347 (1949); *Black* v. *Cutter Laboratories*, 43 Cal. 2d 788, 278 P.2d 905, aff'd., 351 U.S. 292, criticized in Note, 68 Harv. L. Rev. 1285 (1955); *National Cash Register Co.* v. *Wilson*, 8 N.Y. 2d 377, 171 N.E. 2d 302, 305 (Arbitrators may be said to have exceeded their powers "only if they gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties."); *Marceron* v. *Chevy Chase Services, Inc.*, 258 F. 2d 155, 158-159 (C.A.D.C.).

[20] In addition to the first two cases cited in the preceding note, see also, *Glendale Mfg. Co.* v. *Local No. 520, I.L.G.W.U.*, 283 F. 2d 936 (C.A. 4), cert. denied, 366 U.S. 949; *Minkoff* v. *Scranton Frocks, Inc.*, 181 F. Supp. 542, 547 (S.D.N.Y.), aff'd., 279 F. 2d 115 (C.A. 2) ("It seems clear that a federal court should not confirm an award which orders an act to be done contrary to federal law."); *Local 453, I. U. E.* v. *Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y.), and *s.c.* 50 LRRM 2689 (S.D.N.Y., July 9, 1962); *Avco Corp.* v. *Prete* [illegible], 22 Conn. Supp. 475, 174 A. 2d 684. *Cf.*, *Carey* v. *General Electric Co.*, 45 CCH Lab. Cas. ¶ 17,599, pp. 26,692-93 (D.C.S.D.N.Y., April 19, 1962), refusing to order arbitration of an "unlawful claim," and *Duralite Co.* v. *Local 485, IUE*, 50 LRRM 2557 (E.D.N.Y., June 22, 1962), refusing to order arbitration under an agreement set aside by the NLRB.

application to realize its object. Expansive judicial oversight under the guise of determining whether the adjustment board has acted within its power or in keeping with public policy can become an open sluice through which to drain the efficacy of the system by depriving it of the finality which is one of its foremost values. The formulation and application of a standard for the enforcement of an award must therefore be a question of federal law because it is an integral adjunct of the effective functioning of the system that Congress has required be created.

The point is illustrated by the defense respondent interposed to resist the award as "void and unenforceable" (R. 30). Respondent charged that the adjustment board acted without "jurisdiction or authority" and that its award was in excess of its "jurisdiction and authority" (R. 30). Respondent personalized its attack upon the board, stating that it did not exercise an "honest judgment," its actions constituted "legal fraud," and its award is based on "partiality" and "misconduct" (R. 30-31). On a different level, respondent stated that the award is infected with "gross error," "palpable gross error," and is "arbitrary and capricious" (R. 30-31). Insofar as this compendium of conclusory allegations was particularized at all, respondent's attack upon the award seems to reduce to four matters: (1) the adjustment board erroneously concluded that the steps precedent to reference to the board had been followed (R. 30, *cf.* the board's opinion, R. 18-22); (2) the board did not consider the evidence favorable to respondent (R. 30); (3) the award is not supported by substantial evidence (R. 30); (4) the board did not decide certain issues deemed by respond-

ent (but not by the board) to be relevant to the disposition of the controversy (R. 31, *cf.* the board's opinion, R. 25-26). At the forefront of judicial consideration of these claims is the standard to be applied in dealing with them. For example, to what degree, if at all, is an unparticularized conclusory allegation of error to stand in the way of summary judgment? To what degree, if at all, is a claim of evidentiary error to be considered? And the judicial approach is important, not only in ascertaining the applicable standard, but also in the quickness and incisiveness with which the disposition is made. For the salutariness of even an enforced award can be undercut by delay resulting from a protracted and leisurely proceeding. Federal standards are therefore indispensable to protect the efficacy of the federal scheme.

There is yet another reason for control by federal law. Application of state law means the application of the variegated standards of fifty different sovereigns. Major collective bargaining agreements are customarily multistate in coverage. The operations of an air carrier are interstate almost by definition.[21] An agreement with an air carrier is inevitably of the kind that covers employment "in a great number of jurisdictions, spread over the length and breadth of the United States. Under a 'master contract' negotiated in Chicago, a grievance may arise in Utah and, perhaps, be arbitrated in a third state. This would present almost insuperable problems of enforcement in the present context of widely varying judicial attitudes

[21] Respondent serves the six-state area of Arkansas, Colorado, Missouri, Oklahoma, Kansas and Texas.

and the complex set of conflicts-of-law rules in which the subject is enveloped." [22]

Thus the law of at least three jurisdictions is potentially applicable to a single award rendered under a unitary collective bargaining agreement. "An award valid according to the law of the place where it was rendered and legal by the place where it is to be performed may be enforced elsewhere under the rules of comity . . . , unless such enforcement should prove contrary to the public policy of the lex fori . . . , or unless a remedy is called for which is not available under the lex fori . . . . " [23] The complicating difficulties which ensue are illustrated by the opinion in *Moyer* v. *Van-Dye-Way Corp.*, 126 F. 2d 339 (C.A. 3). The employer was a New Jersey corporation; the union represented Pennsylvania citizens; the agreement to arbitrate was made in New York, where the hearing was held and the award rendered; a diversity suit to enforce the award was brought in the United States District Court for the Eastern District of Pennsylvania. In concluding that New York law governed, the Court of Appeals for the Third Circuit stated that (*id.* at 340-341):

> . . . it is clear that in such a suit as this, involving legal effects of events which have occurred in other

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[22] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 257 (1950). Indeed, as Judge Brown noted in dissent (R. 63, n. 36):

> "The selection of the state is only the beginning. What local law of the local state applies? For example, in Texas is it the Arbitration Act, TEX. CIV. STAT. arts. 224-238 (Vernon 1939), or the special one covering labor controversies in arts. 239-249, or the case-made law? See 6 Tex. Jur. 2d Arbitration and Award §§54-57 (1959)."

[23] Anno., *Extraterritorial Enforcement of Arbitral Award*, 73 A.L.R. 1460.

> states, and where the jurisdiction of a federal court is based on diversity of citizenship, it is the duty of the court to apply the conflict of laws rule of the state in which suit is brought. * * * That a suit may be brought in Pennsylvania upon a foreign arbitration award is clear from a recent decision. * * * No Pennsylvania authority found, however, enunciates a rule of reference to the law by which the validity of the award is to be determined. In the absence of exact precedent other available data is to be considered. * * *
>
> Pennsylvania courts have treated an award as comparable to a judgment, and not subject to collateral attack. * * * Validity of a judgment is determined by the law of the state where rendered. * * * The general authority is to the effect that the validity of an arbitration award is determined by the law of the place of its rendition. * * * We conclude that by the Pennsylvania rule of conflict of laws, the validity of the award in this case is a question of New York law.

Yet the nexus between the controversy and the place where the award is rendered can be, and often is, insignificant and fortuitous.[24]

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[24] For example, an agreement covering a plant in West Virginia may be made and performed in that state. Arbitrators to hear grievances at that plant may be drawn from Richmond, Philadelphia, Boston, St. Louis, Chicago, and Washington, D. C. The arbitrator arrives at the plant, conducts the hearing, and returns home from whence he renders his award. The place where he resides, which is the place that the award is rendered, has only an accidental connection with the grievance. This is a typical situation.

Also typical is an agreement negotiated and executed in one state, between a union headquartered in a second state and an employer chartered in a third state and having its home office in a fourth state, covering operations which are nationwide or sectional. A grievance may arise in a fifth state, be heard in a sixth state, and the award rendered in a seventh state deciding a disputed question of contract interpretation and application to apply in every state of the multistate operations covered by the agreement.

"It is readily apparent that state regulation of the labor-management agreement to arbitrate not only brings about the usual irregularities of interpretation and application (the same collective agreement means different things in different states), but places the element of enforcibility literally beyond the control of the parties. Either party can frustrate the agreement with a fair degree of ease. If any sort of reliability is to be injected into the field of labor arbitration, some degree of uniformity or control must be achieved."[25] Congress achieved the requisite uniformity and control in the enactment of the air part of the Railway Labor Act. Air commerce is inherently interstate in scope, and when Congress undertook to regulate the labor relations of air carriers, it necessarily adopted a single national rule essential to the character of the industry and to accomplishment of the regulatory purpose. The air part of the Railway Labor Act is therefore the kind of statute "in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law.' *Jerome* v. *United States*, 318 U.S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated local problems." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 123.

The court below agrees. It observed that state arbitration "statutes varied greatly in their coverage and

[25] Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 259 (1950).

their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards . . . " (R. 50). It reaffirmed the conclusion it reached in an earlier case that "federal law governs the scope of judicial review of an award made by a system board of adjustment under §184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality" (R. 45, n. 7). And in that earlier case the court below stated that, "Congress having required the negotiation of collective bargaining agreements, and the establishment of boards of adjustment to interpret them, we deem it a reasonable corollary thereto that it intended that the scope of review in appeals from these boards should be determined by federal courts, applying federal law." *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13, 17 (C.A. 5), cert. denied, 351 U.S. 925.

II. THE EXISTENCE OF FEDERAL QUESTION JURISDICTION FOLLOWS AS A MATTER OF COURSE FROM THE DETERMINATION THAT FEDERAL LAW GOVERNS THE ENFORCEMENT OF AN AWARD ISSUED BY AN ADJUSTMENT BOARD.

A. Federal Question Jurisdiction to Enforce the Award Exists.

This is an action to enforce an award issued by the adjustment board. Federal law controls its disposition. The standard applicable to test the validity of the award is federally fashioned and enforcement or vacation of the award depends upon the effect of the federal standard. There is no law but the federal law which is pertinent to the action. There is no other law under which the action can arise. The existence of federal question jurisdiction therefore follows as a matter of course from the conclusion that federal law governs

the enforcement of the award. For "it appears from the face of the complaint that determination of the suit depends upon a question of federal law." *Pan American Pet. Corp.* v. *Superior Court,* 366 U.S. 656, 663.

Any doubt is put to rest upon consideration of the decision in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448. Article III, section 2, of the Constitution provides in part that the "judicial power of the United States shall extend to all cases, in Law and Equity, arising under . . . the Laws of the United States . . . " Section 301(a) of the Labor-Management Relations Act, 1947, provides in part that, without regard to amount or diversity, "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . . " The constitutionality of this investiture of jurisdiction in the federal district courts depends on whether an action founded on section 301(a) is a case which "arises under . . . the Laws of the United States . . . . " This Court held that section 301(a) "authorizes federal courts to fashion a body of federal law for enforcement of these collective bargaining agreements" (353 U.S. at 451), and on that basis concluded in a single sentence that a "case or controversy arising under §301(a) is, therefore, one within the purview of judicial power as defined in Article 3" (*id.* at 457). In the present case, since enforcement of an award issued by an adjustment board is similarly governed by federal law, an action to compel compliance with the award is indistinguishably one "arising under" the laws of the United States. To be sure, *Lincoln Mills* was concerned with constitutionality,

and the constitutional grant of federal question jurisdiction has broader reach than the identically worded statutory grant.[26] But there is no difference between the two in the area of application common to this case and to *Lincoln Mills*. For the minimum reach of both the constitutional and statutory grant embraces an action brought by plaintiff in which the governing rule in support of his claim is federally prescribed. This is made clear by Mr. Justice Frankfurter in dissent in *Lincoln Mills*. He departs from the majority, not in the result which should be reached given the view that section 301(a) mandates fashioning substantive federal law, but only because he disagrees with that interpretation, believing instead that section 301 (a) merely provides a federal forum for the enforcement of a right created by state law and that investiture of this sort of "protective jurisdiction" is unconstitutional in that it extends federal judicial power beyond cases "arising under" federal law. However, in words fully applicable to demonstrate the existence of federal question jurisdiction in this case, Mr. Justice Frankfurter succintly summarized the scope of the statutory grant in that area of its application about which no doubt exists either as a question of statutory reach or constitutional power (*id.* at 470):

> Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. *E. g.*, *Gully* v. *First Nat. Bank*, 299 U.S. 109. Although

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[26] *Gully* v. *First National Bank*, 299 U.S. 109, 113-114; Hart & Wechsler, The Federal Courts and the Federal System, 749-752 (1953); Mishkin, *The Federal "Question" In The District Courts*, 53 Col. L. Rev. 157, 160-163 (1953); 1 Moore's Federal Practice 606-607, 629-630 (1961).

> it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co.* v. *Layne & B. Co.*, 241 U.S. 257, 260, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith* v. *Kansas City Title & T. Co.*, 255 U.S. 180. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

When, as here, federal law governs the enforcement of an award, an action to compel compliance with the award calls for "interpretation or application of federal law" "as an integral part of plaintiff's cause of action"; an "aspect of federal law is essential to plaintiff's success"; and "federal law" is so far "in the forefront of the case" that it is impossible to advance it more prominently.

The import of *Lincoln Mills* aside, federal question jurisdiction exists in this case measured by the least expansive view of the scope of the statutory grant. Federal law is at the heart of the action to enforce the award. The right to enforcement is drawn from and determined by federal law. It is a "federal right implied from the statute and the policy which it has adopted."[27] Resistance to enforcement brings about a controversy over a federal right. Controversies "concerning rights which are created by the Constitution or laws of the United States . . . are in their essence federal. . . ." *Swafford* v. *Templeton*, 185 U.S. 487, 494. "Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right,

[27] *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213.

within the meaning of statutes defining the jurisdiction of federal courts." *McGinnis v. Northern Pacific Ry. Co.*, 204 Fed. 998, 1001 (D.N.D.), approved in *Peyton v. Railway Express Agency*, 316 U.S. 350, 352-353; see also, A. Hand, J., in *Wells Fargo & Co. v. Cuneo*, 241 Fed. 726, 727 (S.D.N.Y.). A plaintiff who grounds his claim in federal law necessarily "makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case. He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress . . . ." *Downey v. Geary-Wright Tobacco Co.*, 39 F. Supp. 33, 36 (E. D. Ky.). And so, as here, a claim which is founded on federal law arises under that law in pristine form.[28]

The present case is well within any expression of the tests of federal question jurisdiction. (1) "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112. In this case, federal law is an indispensable ingredient of plaintiff's cause of action, for the legal effect of the award issued by the adjustment board is derived from and controlled by the air part of the Railway Labor Act. (2) "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not

[28] *Peyton v. Railway Express Agency*, 316 U.S. 350; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213; *American Federation of Labor v. Watson*, 327 U.S. 582, 591.

so arise unless it really and substantially involves a controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569. In an action to enforce an award issued by an adjustment board the standard to be applied in testing the validity of the award is at the threshold of adjudication of the controversy. The standard is federally fashioned and draws its content from the air part of the Railway Labor Act. It therefore involves a "construction" of the laws of the United States. And whether the particular award will be enforced, modified, or vacated depends upon the application of the federal standard in the specific circumstances of the case. It therefore involves the "effect" of the laws of the United States. Hence, in every meaningful sense the action "really and substantially" involves a controversy concerning the "construction or effect" of federal law "upon the determination of which the result depends."[29] (3) "The federal nature of the

[29] "What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore, properly involve a construction of that law." *McGoon* v. *Northern Pacific Ry. Co.*, 204 Fed. 998, 1004 (D.N.D.). Referring to the rule that a case does not arise under the laws of the United States "unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or law", Judge Augustus Hand has stated that "Such language, however, is not applicable to cases where the right relied upon by the person bringing the suit was based upon a federal law, but to cases where that law was not directly and necessarily the basis of the action." *Wells Fargo & Co.* v. *Cuneo*, 241 Fed. 726, 727 (S.D.N.Y.). The thought behind this view is that where, as here, an action is "based upon a federal law" the application of any test of federal question jurisdic-

right to be established is decisive—not the source of the authority to establish it." *Puerto Rico* v. *Russel & Co.*, 288 U.S. 476, 483. In this case the right asserted is federal in origin, scope, and attributes. What it is depends on what federal law makes it into. It is altogether a federal creature.[30] It is therefore wholly clear that federal question jurisdiction exists.

B. Access to the Federal District Court to Enforce the Award Which Otherwise Exists by Reason of Federal Question Jurisdiction Is Not Impliedly Withheld by the Air Part of the Railway Labor Act.

In concluding that access to the federal district court to enforce the award does not exist by reason of federal question jurisdiction, the true posture of decision by the court below is that, although "federal law governs the scope of judicial review of an award made by a system board of arbitration" (R. 45, n. 7), it is inferable from the air part of the Railway Labor

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tion to the action is virtually redundant. Such an action is inherently federal in nature and any test which would exclude it from federal question jurisdiction would expose the fallacy of the test rather than the absence of jurisdiction. The axiomatic character of this proposition is revealed by the single sentence disposition of this aspect of federal question jurisdiction in Hart and Wechsler, The Federal Courts And The Federal System, 763 (1953): "That an action arises under federal law if the plaintiff asserts a federally-created cause of action seems plain."

[30] Compare the cases holding that a suit against a surety based upon a bond of a United States marshal (*Feibelman* v. *Packard*, 109 U. S. 421), a bond of a clerk of a federal court (*Howard* v. *United States*, 184 U.S. 676), a supersedeas bond (*American Surety Co.* v. *Schultz*, 237 U.S. 159), and a materialmen's bond (*United States ex rel. Giant Powder Co.* v. *Axman*, 152 Fed. 816 (C.C. Cal.)), arises under a law of the United States and therefore confers federal question jurisdiction, because the requirement of the bond derives from federal law and its attributes are determined by federal law

Act that notwithstanding the dependence of the action on federal law Congress nevertheless committed enforcement of the award to state courts and withheld jurisdiction from the federal courts in the absence of diversity (R. 46-51). On this view vindication of this federal right is to reside in the state courts in accordance with the judicial scheme which prevailed until 1875 when Congress initially invested the federal courts with federal question jurisdiction.[31] In other words, Congress in 1936 in enacting the air part of the Railway Labor Act *pro tanto* repealed the Judiciary Act of 1875 and its successors and deprived the federal courts in this area of the federal question jurisdiction which would otherwise exist by virtue of the general statutory grants. There is no reasonably tenable basis upon which to entertain much less to accept this position.

The court below bases its position on a difference it perceives between an adjustment board contractually established pursuant to the statutory duty to create it and the permanent National Air Transport Adjustment Board which the National Mediation Board is empowered to establish but has not set up. Section 205 of the air part of the Railway Labor Act provides that, "When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes . . . growing out of grievances or out of the interpretation or application of agreements . . . , the National

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[31] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 362-368; Hart and Wechsler, The Federal Courts And The Federal System, 729-733 (1953); Mishkin, *The Federal "Question" In the District Courts*, 53 Col. L. Rev. 157 (1953).

Mediation Board is hereby empowered and directed" to cause the establishment of "a board which shall be known as the National Air Transport Adjustment Board." This latter board is to function "in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by Section 3 of Title I of this Act" and the "powers and duties" of the National Air Transport Adjustment Board are to be identical with those of the National Railroad Adjustment Board. An award issued by the National Railroad Adjustment Board is in terms enforceable in a District Court of the United States (RLA, title I, sec. 3(p)), and like access to a federal district court is therefore in terms available to enforce an award made by the National Air Transport Adjustment Board. The court below concludes that the specific provision for recourse to a federal district court to enforce an award issued by the National Air Transport Adjustment Board, in comparison with the absence of a like provision in the case of an award issued by the contractually established adjustment board, negatively implies that Congress barred recourse to a federal court in the absence of diversity to enforce an award issued by the latter board (R. 46-51; *Metcalf* v. *National Airlines*, 271 F.2d 817, 819-820 (C.A. 5)). It calls the awards of the contractual board "lower-status awards" (R. 47), and states that Congress made it "clear that it was not elevating to the same rank the status of an award" of a contractual board as it granted to an award issued by either the National Railroad Adjustment Board or the National Air Transport Adjustment Board. *Metcalf* v. *National Airlines, supra*, at 819. The court below buttresses its conclusion with

the speculation that, as state courts were receptive to enforcement of an award when issued in contradistinction to their hostility to enforcement of an executory agreement to arbitrate a future dispute, Congress might therefore have concluded that commitment of enforcement of the award to state courts in the absence of diversity did not jeopardize the federal scheme (R. 48-51).

The immediate trouble with the exposition by the court below is that it has nothing to do with the reasons Congress actually entertained in providing for the creation of both a contractual board and a National Air Transport Adjustment Board. The original draft of the bill which became the air part of the Railway Labor Act contained in the identical form in which it was finally enacted the provision empowering the National Mediation Board to establish the National Air Transport Adjustment Board when "it shall be necessary to have a permanent national board of adjustment. . . ." However, unlike the finally enacted version, the original draft contained no provision requiring the handling of grievance disputes in the "usual manner" and making it the "duty" of the parties "to establish" an adjustment board. Instead, section 203 of the original draft provided that the "jurisdiction of the National Mediation Board is extended to and shall cover *each and every dispute*," and section 204 left it optional with the parties to establish an adjustment board by agreement.[32] George A. Cook, secretary of

[32] Hearings before the Subcommittee of the Senate Interstate Commerce Committee on S. 2496, 74th Cong., 1st Sess., 1-2 (1935):

Sec. 203. The jurisdiction of the National Mediation Board is extended to and shall cover each and every dispute between said carriers by air or any of them and its or their employees, and the services of the National Mediation Board may be invoked in

the National Mediation Board, expressed on behalf of the Board two reasons in opposition to this arrangement. First, it "appears to place upon the National Mediation Board the burden of adjusting by mediation the individual grievances of employees by air. This is likely to produce such a vast volume of work as to interfere seriously with the capacity of the National Mediation Board to fulfill the functions placed upon it by the Railway Labor Act." Second, "the bill in its present form would therefore depart from the plan devised in the Railway Labor Act for handling disputes among employees of the railroads, where the line is drawn so that the Mediation Board will deal only with representation cases and cases involving larger questions of changes in rules and working conditions, leaving to the National Railroad Adjustment Board the settlement of individual grievances arising or disputes involving the interpretation of contracts." [33] The National Mediation Board therefore suggested compulsory creation of an adjustment board

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the same manner and to the same extent as though any or all such disputes were specifically mentioned in section 5 of title I of this Act.

Sec. 204. Nothing in this title shall be construed to prevent any individual carrier, system or group of carriers by air, and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this title, from mutually agreeing to the establishment of system, group, or regional boards of adjustment under the authority of section 3 of title I of this Act; or, pending the establishment of a permanent national board of adjustment as hereinafter provided, to prevent said carriers by air and any class or classes of their employees, all acting through their representatives, selected in accordance with the provision of this title, from mutually agreeing to the establishment of a national board of adjustment of temporary duration and of similarly limited jurisdiction.

[33] *Id.* at 11.

by the parties to substitute for the method of handling proposed by the original draft.[34] The bill as finally enacted adopted the suggestion of the National Mediation Board in the exact form that the Board had recommended.[35]

At the Senate committee hearing, in considering the suggestion of the National Mediation Board for compulsory creation of an adjustment board, Senator Black inquired whether the substitution would diminish the benefits available to employees of air carriers and he was assured that it would not:[36]

> Senator BLACK. As to substituting for sections 203 and 204 what you suggest, might I ask if those substitutes are drawn in such a way as to give exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment.
>
> Mr. COOK. I understand so.
>
> Senator BLACK. The object is not to impair the effectiveness of the bill, but simply to make it apply with uniformity to both classes of employees, as I understand.
>
> Mr. COOK. That is correct.

Not only does the adjustment board contractually established pursuant to statutory duty "give exactly the same range to the men," but the reason that Congress had for postponing the establishment of a National Air Transport Adjustment Board—an event which has not yet occurred and is not likely to in the foreseeable future—is without any substantive sig-

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[34] *Ibid.*

[35] *Ibid.*

[36] *Id.* at 12.

nificance. "The reason for this permissive delay in its formation is that there is nothing for such a board to do until employment contracts have been completed, and there are no such contracts in operation now. In this way unnecessary expense is avoided until the need arises." H. Rep. No. 2243, 74th Cong., 2d Sess., 1 (1936).

There is thus no basis for invidious comparison between a contractual board and the National Air Transport Adjustment Board. Congress has ordained both. Each is a coequal method of adjustment possessing commensurate capacity for effective achievement of the congressional objective "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." Congress deferred establishment of a permanent national air adjustment board simply to avoid "unnecessary expense", and the alternative it mandated of compulsory creation of a contractual board was a fully effective substitute. Congressional frugality bears no interpretation that a permanent national board, if and when established, constitutes a superior form of adjudication. On the contrary, even if a permanent national board is organized, the parties remain free to retain the contractual board; the contractual board is disestablished only if it "is not satisfactory to either party thereto", and the dissatisfied party upon ninety days' notice to the other "may elect to come under the jurisdiction of the National Air Transport Adjustment Board" (RLA, title II, sec. 205, last sentence). Similarly, under the rail part of the Railway Labor Act, notwithstanding the creation of the National Railroad Adjustment Board, the par-

ties are not prevented "from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section" (RLA, title I, sec. 3 second). The committee reports show that a contractual board thus set up by voluntary agreement is regarded by Congress as at least a co-equal if not indeed a superior method of adjustment. The Senate Report observed that (S. Rep. No. 1065, 73d Cong., 2d Sess., 2):

> The bill also provides for the establishment of regional or system boards of adjustment, if the railroads and the employees desire to set up such boards voluntarily. The ideal situation would be to have disputes and grievances settled by the men and management on the several properties without any recourse to adjudication by an outside tribunal. Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes by voluntary adjustment boards between the employees and the railroads.

The House Report observed that (H. Rep. No. 1944, 73d Cong., 2d Sess., 3-4):[37]

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[37] George M. Harrison, president of the Brotherhood of Railway Clerks, testified that "it is our intention and our purpose that such system boards, group boards, or regional boards that are established by the parties, by agreement, will provide such terms that the decisions can be enforced in the courts. The fact of the matter is the present law provides for that. It provides that decisions shall be final and binding and conclusive on the parties, and I think that kind of decision can be enforced." Hearings before the Senate Interstate Commerce Committee on S. 3266, 73d Cong., 2d Sess., 34 (1934). See also his testimony to like effect in Hearings before the House Interstate Commerce Committee on H.R. 7650, 73d Cong., 2d Sess., 88-89 (1934).

> Finally, the bill gives absolute freedom to the carriers and the employees to establish any other machinery upon which they may voluntarily agree. If such voluntary machinery should be established, then the parties are exempt from the jurisdiction of this National Board.

Congress has thus established coequal methods of adjustment in providing for the creation of both a contractual board and the National Air Transport Adjustment Board. This duality furnishes no basis for the court below to depreciate the award of the contractual board as "lower-status" or to attribute an inferior "rank" to it (*supra*, p. 43). Since an award by either type of board has commensurate dignity, access to a federal district court to enforce an award issued by the National Air Transport Adjustment Board suggests equivalent access to enforce an award issued by a contractual board. Specific provision in the air part of the Railway Labor Act for recourse to a federal district court to enforce an award of the National Air Transport Adjustment Board, if it plausibly argues in favor of any differentiation, implies that the federal court is the *exclusive* forum for enforcement of an award rendered by that board. But it does not imply debarment from the federal court in the absence of diversity to enforce an award rendered by the contractual board. The general statutory grants of federal question jurisdiction confer an incontrovertible basis for invoking the competence of the federal courts for this purpose. Silence or tenuous negative implication does not destroy this fountainhead of jurisdiction. As the court below itself acknowledges, it would be "ironical that of all the large industries engaged in interstate commerce only in the airling industry are parties to a collective bargaining agreement denied

access to federal district courts in non-diversity cases for the purpose of enforcing arbitration awards. If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry" (R. 59). Access exists by virtue of the grant of federal question jurisdiction. To be sure, state courts have concurrent jurisdiction to enforce an award of the contractual board.[38] But the court below holds that state courts, in the absence of diversity have jurisdiction to the exclusion of the federal courts. This conclusion can only be accepted by finding in the 1936 enactment of the air part of the Railway Labor Act a *pro tanto* repeal of the statutory grant of federal question jurisdiction which has existed since 1875. To borrow the language of the court below, this conclusion is impermissible on "the tenuous basis suggested here" (R. 51), especially in view of the "elementary" principle "that repeals by implication are not favored."[39]

The impermissibility of the conclusion is further exposed by the self-defeating character of a major reason assigned by the court below to support it. The court below speculates that, as state courts were receptive to enforcement of an award when issued in contradistinction to their hostility to enforcement of an executory agreement to arbitrate a future dispute, Congress might have concluded that commitment of enforcement of the award to state courts in the absence of diversity would not jeopardize the federal scheme (R. 48-51). The logic of this position is that federal courts would have jurisdiction to grant specific per-

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[38] *Cf., Doud Box Co.* v. *Courtney*, 368 U.S. 402; *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95.

[39] *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 456-457.

formance of an agreement to submit disputes to the adjustment board in view of the state courts' antagonism to this branch of arbitration. But jurisdiction to compel specific performance of an agreement to arbitrate cannot be tenably divorced from jurisdiction to enforce the ensuing award. "'If there is jurisdiction in one case it would seem there should be jurisdiction in the other. * * * The purpose of Congress to give effect to employer-union contracts and to afford full relief for breaches of those contracts would be frustrated if the courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept. * * * If arbitration can be specifically enforced, the court should have power to afford complete relief by enforcing the award." *Textile Workers Union* v. *Cone Mills Corp.*, 268 F.2d 921, 924-925 (C.A. 4). See also, *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 595-596.

Consideration of another significant aspect of the statutory scheme confirms the untenability of implying from the air part of the Railway Labor Act lack of federal jurisdiction to enforce the award. It is settled that a union subject to the rail part of the Railway Labor Act may be enjoined by a federal district court from striking over a dispute pending before the National Railroad Adjustment Board. *Supra*, pp. 17-18, 21 n. 7. The same conclusion has been reached as to unions subject to the air part of the Railway Labor Act based upon the identity of function performed by the adjustment board under the air part as is performed by the NRAB under the rail part and the duty of adherence to the adjustment procedure compulsorily prescribed by both parts. *IAM* v. *North-*

west Airlines, 50 LRRM 2499 (C.A. 8, June 19, 1962); *cf., Flight Engineers* v. *American Airlines*, 50 LRRM 2453 (C.A. 5, June 7, 1962). It would be anomalous indeed to hold that in air transportation a federal district court has power to enjoin a union from striking over a dispute pending before the adjustment board but no power to enforce the award favorable to the union thereafter issued as a result of the very procedure which the injunction has been designed to protect. Obviously, the power to safeguard the adjustment process while it is in progress carries with it the power to put into effect the fruits of the procedure. It would be sheer caprice to imply ouster of the federal court's power at the culminating step. Furthermore, the power of the federal court to intervene to enjoin a strike is based on ascription of the same status to the adjustment board under the air part as is enjoyed by the NRAB under the rail part, and further undercuts the assumption of the court below that the adjustment board occupies lower-status or inferior rank. Indeed, were it true that the adjustment board's position is subordinate, it would undercut the premise on which the federal court's power to issue a strike injunction is founded in the first place.

In sum, consideration of the statutory scheme as a whole permits no basis for implying that the air part of the Railway Labor Act withholds power from a federal district court to enforce an award issued by an adjustment board which otherwise exists by reason of federal question jurisdiction.

C. Federal Question Jurisdiction Cannot Be Defeated by the Patent Self-Contradiction That, Although "Federal Law Governs the Scope of Judicial Review" of the Award, a Suit to Enforce the Award Is a "State-Created Action."

The court below agrees that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . ." (R. 45, n. 7). It nevertheless states that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). This is a patent self-contradiction. And on the basis of this self-contradiction the court below denies the existence of federal question jurisdiction (R. 52-59).

Law "'in the sense in which courts speak of it today does not exist without some definite authority behind it.'" *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79. An action is created by the sovereign who prescribes the rules for its governance. Congress through the enactment of the air part of the Railway Labor Act prescribes the rules for the governance of an action to enforce an award of an adjustment board. Its command that disputes over grievances or the interpretation or application of agreements shall be determined by an adjustment board of itself indelibly establishes the federal character of the action. "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203.[40] See

[40] This was said of a state-created action on a contract brought in a federal court by reason of diversity. Because of the affect on the action of the arbitral remedy, this Court required reference

also, *Drake Bakeries* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 266. The arbitral mode is especially significant in the enforcement of the labor agreement, for "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578. The requirement of recourse to the adjustment board is an integral adjunct of the substantive rights conferred by the agreement and strongly influences their import. "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581. State law plays no part in the operation of this process. In determining disputes over the interpretation and application of the agreement, the adjustment board "may of course look for guidance from many sources" (*United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597), but it owes no duty of obedience to state law in arriving at an award which is faithful to the agreement. Insofar as an outside sovereign is empowered to influence the result at all, it is federal law which is operative through the application of a federal standard in determining whether to enforce, modify, or vacate the award. By control over the enforceability of the award federal law establishes the limits within which the adjustment board is free to act and which the board is bound to respect if it is to issue viable awards. The upshot is that state law does not

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to the law of the state creating the action (including its conflict of laws rule) to determine whether the state would compel arbitration. Where, as here, federal law compels arbitration, displacing any contrary state law, the right to be enforced via arbitration cannot be state-created, for the sovereign who controls the remedy to enforce the right controls the right.

require creation of the adjustment board; state law cannot forbid establishment of the adjustment board; state law cannot release the parties from obligatory recourse to the adjustment board; the adjustment board operates free of state law; and state law does not control the enforceability of the award. It is therefore impossible to conclude that a suit to enforce the award "is nothing more than a state-created action to construe a contract" (R. 59). It cannot be state-created if state law does not enter into it.[41] Law "is not a brooding

[41] The cases relied upon by the court below to show that the action is state-created are not helpful. (1) *Duplisea* v. *Maine Central Railroad*, 260 F. 2d 495 (C.A. 1), cited at R. 45, n. 6, 48, 57, pertains to the narrow exception where an employee accepts his severance from employment as final and sues to recover damages for wrongful discharge in breach of contract. *Supra*, p. 21, n. 7. (2) *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337 (C.A. 9), cited at R. 58, is a case which this Court has stated "was decided incorrectly." *Conley* v. *Gibson*, 355 U.S. 41, 44, n. 4. (3) The disposition in *Shipley* v. *Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (D.C. Pa.), cited at R. 58, seems erroneous in view of the exclusive commitment to the National Railroad Adjustment Board of controversies of the kind involved in that case. *Supra*, p. 21, and n. 7. (4) *Amalgamated Association* v. *Southern Bus Lines*, 189 F. 2d 219 (C.A. 5), cited at R. 56, is an action to compel arbitration of *new* contract terms as distinguished from a dispute as to the interpretation or application of an existing agreement. Arbitration of *new* contract terms is a specialized situation upon which this Court has not yet spoken and which presents differentiating considerations which perhaps take it out of the rule of *Lincoln Mills*. *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 553 (D. Mass.), affirmed, 241 F. 2d 787 (C.A. 1), cert. denied, 355 U.S. 817. An action to compel arbitration of a dispute as to the meaning or application of an existing agreement does of course arise under the federal law in an industry covered by the Labor Management Relations Act, 1947. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. The import of the United States Arbitration Act in this situation, much considered and disputed before *Lincoln Mills* (*Local 205, United Electrical Workers* v. *General Electric Co.*, 233 F. 2d 85 (C.A. 1), affirmed, 353 U.S. 547; Cox, *Grievance Arbitration in The Federal Courts*, 67 Harv. L. Rev. 591 (1954)), has been rendered supererogatory by *Lincoln Mills*.

omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . . .'"[42] The only sovereign in this field is Congress.

Nor does the court below advance its position by asserting that federal law does not require the carrier and the representative to incorporate any particular substantive terms into their agreement (*e.g.*, the wage rate) but leaves them free to fix the terms for themselves (R. 46, n. 8, 59).[43] The federal law which vouchsafes this freedom also requires the state law to refrain from interfering with it. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295-296. But this freedom is irrelevant after agreement is reached and the question then becomes the means

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[42] Mr. Justice Holmes dissenting in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 222. See also, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 102.

[43] In this case, the aggrieved employee's right to union representation in the investigation and hearing of his discipline or discharge, explicitly granted by the agreement (R. 16) and enforced by the award (R. 10-26), is a right which is also conferred by the Railway Labor Act independently of the agreement. Section 2, fourth, of the Railway Labor Act provides that "Employees shall have the right to . . . bargain collectively through representatives of their own choosing." Grievance adjustment is of course an integral part of collective bargaining (*Conley* v. *Gibson*, 355 U.S. 41, 46-47; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521), and contested cases of discipline or discharge are grist for the grievance mill. The employee aggrieved by his discipline or discharge is therefore entitled to union representation in contesting it as part of his "right to . . . bargain collectively through representatives of his own choosing." Accordingly, the particular underlying right in issue in this case is one that the carrier is required to respect by statute independently of its protection by contract.

of enforcing the substantive terms that have been voluntarily undertaken. "If a man makes a contract he gives up the constitutional right that previously he had to be free from the hamper that he puts upon himself."[44] And federal law alone fashions the "hamper" when the agreement is between an air carrier and the representative of its employees. Enforcement of the underlying rights conferred by the agreement is determined by the adjustment board independently of state law, and enforcement of the award issued by the board encasing those rights is determined by a court independently of state law.

Also beside the point is the principle invoked by the court below that an action does not arise under federal law if the federal question enters only by way of defense (R. 54-55). The postulate of the court below is that in this case a federal question is implicated only if the carrier in resisting enforcement of the award challenges the jurisdiction of the adjustment board and thereby requires a construction of the Railway Labor Act which defines that jurisdiction (*ibid.*). The court below supplied its own refutation when it agreed that "federal law governs the scope of judicial review of an award made by a system board of adjustment . . . " (R. 45, n. 7). Federal law enters the case with the plaintiff. It is the only law upon which he relies or which he can invoke to support his claim for enforcement of the award.

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[44] Mr. Justice Holmes dissenting in *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 497.

CONCLUSION

For the reasons stated, the judgment should be reversed and the case remanded to the District Court with instructions to take jurisdiction and decide the merits of the claim.

Respectfully submitted,

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